CASE COMMENTS

THE DEMISE OF "VEXATION AND OPPRESSION"

McSHANNON v. ROCKWARE GLASS LTD.

V. MCAULIFFE*

The principles upon which a court should exercise its discretion to grant a stay of proceedings under section 41 of the Supreme Court of Judicature (Consolidation) Act 1925 (U.K.) have again been the subject of careful consideration and re-statement by the House of Lords in the recent case of *McShannon v. Rockware Glass Ltd.*[1] This case continues and clarifies the development in the law made by the House of Lords in the *Atlantic Star.*[2] Taken together the two cases present an example of the common law method of gradual adaptation of the law to changed social conditions.[3]

The judgments in *McShannon* cover four appeals, each involving a claim for personal injury or disability sustained by a Scottish plaintiff in the course of employment in Scotland. In each case the employer company's head office was in England, and jurisdiction of the English courts was invoked on the common law ground of presence within the jurisdiction. This, and the fact that all plaintiffs were members of trade unions with headquarters in England, were the only connections which the causes of action had with England. The possible fortuity of the general basis for jurisdiction was thus underlined. Two of the appeals came from the Court of Appeal who, by a majority,[4] had dismissed the employers' appeal from the order of Robert Goff J. refusing to stay the actions. The other two came directly from a similar refusal by Griffiths J., who had quite properly regarded himself as bound by the Court of Appeal's decision in the two earlier appeals. The House of Lords unanimously held that the English action should be stayed. Although five separate judgments were handed down and three of them fully

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1 [1978] 2 W.L.R. 362

2 [1974] A.C. 436

3 Very arguably the Court of Appeal decision in Maharanee of Baroda v. Wildenstein [1972] 2 Q.B. 283 foreshadowed the development in the Atlantic Star and should be included in this developmental pattern.

4 Stephenson and Waller L.JJ., Lord Denning M.R. dissenting.

cover the authorities and issues raised, the case is characterised by broad agreement on the principles of law involved.[5]

Prior to *McShannon* the most oft-cited formulation of the principles applicable to cases where a stay is sought on the ground that concurrent jurisdiction exists in another forum was that of Scott L.J. in *St. Pierre v. South American Stores (Gare and Chaves) Ltd.*[6] He said:

> "The true rule about a stay under section 41, so far as relevant to this case, may I think be stated thus; (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant."

In *McShannon* three of the five members of the House decided that the words "oppressive or vexatious" should no longer be included as part of the test for granting a stay of proceedings. After making reference to "the more liberal interpretation" of these words recommended by Lords Reid and Wilberforce in the *Atlantic Star,*[7] Lord Diplock said:[8]

> "To continue to use these words to express the principle to be applied in determining whether an action brought in England should be stayed can, in my view, lead only to confusion."

This is welcome recognition of the necessity of keeping the legal meaning of words within the parameters set by the ordinary use of language. To liberally interpret a word or phrase is to extend its use to those factual situations or things which lie outside its "core of settled meaning".[9] However the situations in which English courts are now prepared to grant a stay are so far beyond the paradigm cases of oppression and vexation, that continued use of the phrase is misleading. This is evidenced by the decision of the majority of the Court of Appeal in the present case.[10] In effect both Stephenson and Waller L.JJ. treated the decision in the *Atlantic Star* as a product of the peculiar factual cir-

5 Given this, one wonders whether the 'publish or perish' syndrome is not also affecting their Lordships.

6 [1936] K.B. 382, 398.

7 [1974] A.C. 636 at 454, 468.

8 [1978] 2 W.L.R. 362 at 367.

9 H. L. A. Hart, The Concept of Law (1961) p. 140. See generally Ch. vii.

10 [1977] 1 W.L.R. 376 see per Stephenson L.J. 384 and Waller L.J. 388.

cumstances of the case, rather than as a decision heralding a marked change in the principles of law applicable.

The second important development is the use by the majority of the notion of the natural forum. This follows the distinction drawn by Lord Reid in the *Atlantic Star* where he said:[11]

> "I would draw some distinction between a case where England is the natural forum for the plaintiff and a case where the plaintiff merely comes here to serve his own ends. In the former the plaintiff should not be 'driven from the judgment seat' without very good reason, but in the latter the plaintiff should I think, be expected to offer some reasonable justification for his choice of forum if the defendant seeks a stay."

With Lords Diplock, Salmon and Keith of Kinkel as well as all members of the Court of Appeal taking up and using this notion in the *McShannon* litigation, it is clear that it has become part of the conceptual apparatus for determining the question of staying proceedings. Unfortunately the meaning of "natural forum" is not at all clear. In the factual situations of the *Atlantic Star* and *McShannon,* designation of the Belgian and Scottish forums respectively as the "natural forums" is readily understandable because in each case the litigation obviously belonged there. However factual situations can easily be conceived in which this will not be the case.[12] In *McShannon* Lord Diplock attended to the meaning of the concept only to the extent of offering "appropriate" as a synonym for "natural",[13] whilst Lord Keith explained it as "being that [forum] with which the action has the most real and substantial connection".[14] This latter formulation suggests that, in every case, one forum will be designated as the "natural forum"; if it is not obvious which forum should be so described, analysis of the contacts which the litigation has with those in question will determine it. An alternative view is that all that is entailed by the notion of a "natural forum" is recognition that in some, but not all, cases there is a forum to which the litigation obviously belongs. It is submitted that both the factual circumstances which gave rise to the notion in the *Atlantic Star* and *McShannon* and the language of Lord Reid in the former case and Lords Diplock and Salmon in the latter, favour the alternative view.

Consideration of the use to which the notion of the "natural forum" is put, also favours this latter view. Traditionally a plaintiff who invoked

11 Id. 454.

12 What, for example, would have been the natural forum in Boys v. Chaplin [1971] A.C. 356 or Sayers v. International Drilling Co. [1971] 1 W.L.R. 1176? The answer is certainly not obvious.

13 [1978] 2 W.L.R. 362 at 370.

14 Id. at 382.

the jurisdiction of a court on a common law ground was regarded as having a prima facie right to have his case heard there. The onus of persuading the court that a stay ought to be granted thus lay on the defendant. To discharge it he had to prove both that there was another forum to which he was amenable, in which justice could be done at substantially less inconvenience and expense and that a stay would not deprive the plaintiff of some legitimate juridical or personal advantage available to him in the forum of his choice. The "natural forum" now holds the formerly preferred position of the common law forum. Although their Lordships' formulations of the function of the distinction between the natural and other forums differ somewhat, it is submitted that after *McShannon,* once the defendant has proved that there is a natural forum which is less inconvenient and expensive than that chosen by the plaintiff, he has made out a prima facie case for a stay and the onus shifts to the plaintiff to prove reasonable justification for his choice of forum in the form of a legitimate personal or juridical advantage available to him there.[15] Given that this is a substantial infringement of the plaintiff's traditional privilege of choosing the forum, it seems likely that it will be admitted only where an alternative forum is clearly the most appropriate and not where it is merely the forum having the most real and substantial connection with the case. Moreover, it would seem inappropriate to open the Pandora's box of contacts analysis in this area of the law. The granting of a stay is a discretionary matter and the process will very often involve a partially intuitive balancing of conflicting considerations. Premissing this process on a purportedly analytic determination of the onus of proof would almost certainly add to the complexity of the law and it is most unlikely that this would be compensated by increased certainty of the outcome.

The third significant aspect of the case is the clear statement that the advantages and disadvantages which will be considered by the court in the "critical equation" are only those which have been proven to exist objectively. When the test of "vexation and oppression" was part of the law, subjective beliefs of the defendant were necessarily relevant in applying it and this subjectivity flowed on to the nature of the advantages upon which the plaintiff could rely. This is no longer the case. The law as it now stands is clearly stated by Lord Keith.[16]

> "As to the nature of the advantages and disadvantages which may go into the scale on either side, I am of opinion that they must be such as are capable of being objectively demonstrated. I do not consider that mere genuine belief that an advantage or disad-

[15] Id., per Lord Diplock 367, 370; per Lord Salmon 373-5 and Lord Keith 382-3.
[16] Id. at 383.

> vantage exists, not supported by adequately established grounds, can properly affect the result. Objective matters such as I have in mind would include the place of residence of the plaintiff, . . . or solid evidence of the existence in the suggested alternative forum of a rule of law or of procedure such as to make an action there less attractive to the plaintiff than one in England."

Thus in the instant case, the Court of Appeal in holding that the plaintiff's solicitors' bona fide belief in the advantageousness of English proceedings provided sufficient ground to justify refusal of a stay, had erred in law and the exercise of their discretion was thereby vitiated.

In view of all these changes in the law, it is submitted that a restatement of the law should omit the first of Scott L.J.'s propositions in the *St Pierre* case[17] and be as follows: —whether or not a court should grant a stay is dependent upon what the court in its discretion considers that justice demands. As a guide to the exercise of its discretion, the general test is that in order to justify a stay two conditions must be satisfied: (a) the defendant must satisfy the court that there is another court to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience and expense; and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court. If the forum in which the stay is being sought is the natural forum, the onus of proving both these conditions lies on the defendant. If however the alternative forum is the natural forum, in the sense of being the forum in which litigation is obviously appropriate, then the plaintiff must prove some real personal or juridical advantage of which he would be deprived if a stay were granted. This test is to be applied objectively and the subjective beliefs of the parties are irrelevant.

The conceptually interesting question which remains for consideration is the relationship between the English position as thus re-stated and a doctrine of *forum non conveniens.* This should be assessed by reference to the specific considerations which are taken into account in application of the test. It cannot realistically be denied that English law does now stop "not far short of a balance of convenience".[18] It is consequently tempting to say that, despite judicial protestations in both *McShannon* and the *Atlantic Star,* the effect of these decisions has been to introduce a doctrine of *forum non conveniens* through the back door. Only the judgment of Lord Diplock supports this view. The difference between the two approaches, lies in whether the convenient forum is

[17] See above p 455

[18] [1978] 2 W.L.R. 362 at 377 per Lord Russell of Killowen.

assessed by reference to considerations relevant to the administration of justice in a particular system as well as those pertaining to the demands of justice vis-a-vis the parties to the particular dispute.[19] Taking the view that both sets of considerations are relevant, Lord Diplock took into account the convenience and expenses of the parties and, as a separate matter, of witnesses, assessed on the facts of places of residence and the place in which facts giving rise to the cause of action occurred.[20] In contrast Lords Salmon and Keith, with whom Lords Russell and Fraser agreed, looked to the convenience of witnesses only as it affected the parties, whether through extended absences from the defendant's work place or additional expenses to the parties.[21] Lord Diplock also accepted the argument put by counsel for the defendants that the court should take account of the increasing number of Scottish personal injuries claims being litigated in England. Thus he said:[22]

> "Lastly, there is an element of public policy involved; that the administration of justice in the United Kingdom should be conducted in such a way as to avoid unnecessary diversion to the purposes of litigation, of time and efforts of witnesses and others which would otherwise be spent on activities that are more directly productive of national wealth or well being. Many a mickle makes a muckle; and if it were to become the common practice to bring Scottish industrial injury cases in England, the total waste of time and effort would be substantial."

In contrast Lord Salmon expressed the majority view that "matters of general policy should [not] play any part in deciding appeals such as the present".[23] He continued:[24]

> For my part, I think that such appeals should be decided solely upon the test of whether justice demands as between the plaintiff and the defendant that the action should be tried in England or in Scotland."

Certainly the English law now approximates *forum non conveniens* very closely, but the distinction between the two approaches is real if fine. It should therefore be concluded that a doctrine of *forum non conveniens* is not part of English law and that the new approach is better encapsulated as a "justice between the parties" test.

19 Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Francais".
20 Id. at 367.
21 Id. at 375 and 385.
22 Id. at 368-9.
23 Id. at 376.
24 Id. at 376.